IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of	:	
THOMAS & KATHRYN OLICK	:	
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	:	CIVIL ACTION
THOMAS W. OLICK	:	
Plaintiff/Appellant,	:	NO. 01-6253
	:	
v.	:	
	:	
GARY EVERITT and	:	
DANYELLE MOZZATTO	:	
Defendants/Appellees.	:	

MEMORANDUM and ORDER

YOHN, J. JUNE _____, 2002

Debtor, Thomas Olick ("Olick"), appeals from the bankruptcy court's November 9, 2001 order denying his motion to reconsider its order of June 25, 2001, granting Gary Everitt and Danyelle Mozzatto's motion for mandatory/permissive abstention.[1] In this appeal, Olick challenges the bankruptcy court's determination that his adversary complaint against appellees, which was filed in the United States Bankruptcy Court for the Eastern District of Pennsylvania, involved solely matters of state law, thereby making abstention an appropriate course of action for the bankruptcy court. Upon reviewing this appeal, I conclude that the bankruptcy court's

[1] On November 16, 2001, Olick filed a notice of appeal of the bankruptcy court's November 9, 2001 order. Subsequently, on November 27, 2001, Olick filed a corrected notice of appeal, indicating that he was appealing not only the bankruptcy court's November 9, 2001 order, but also its June 25, 2001 order. Under Bankr. R. P. 8002(a), a notice of appeal must be filed within ten days of the date the judgment appealed from is entered. Thus, Olick's initial notice of appeal from the bankruptcy court's November 9, 2001 order was timely, but his corrected notice of appeal from the bankruptcy court's June 25, 2001 order was not. Accordingly, only the bankruptcy court order of November 9, 2001 is properly on appeal.

November 9, 2001 order should be affirmed.

BACKGROUND

Olick filed for bankruptcy under Chapter 13 of the Bankruptcy Code on July 11, 1996. Thereafter, on September 1, 1996, Olick leased a property, the Silver Dollar Cafe, to appellees, Gary Everitt and Danyelle Mazzotta, agreeing to convey a liquor license interest along with the property. The liquor license to be conveyed was originally owned by Harold Robinson ("Robinson"), but pursuant to a 1989 lease agreement between Olick and Robinson, the license was to have been conveyed to Olick. ("Olick-Robinson lease agreement").[2] When Olick did not immediately convey this interest, appellees provided Olick with a notice of default. The default was not cured by Olick, and therefore appellees began to withhold rent. As a result, Olick instituted an action against them before a District Justice in Northampton County, which resulted in an award of damages in his favor. Although the record does not clearly support the statement, the parties seem to agree that appellees here then appealed this award to the Northampton County Court of Common Pleas on January 10, 1997. On that same date, appellees also filed a complaint (and later an amended complaint) against Olick in that court alleging breach of contract and seeking punitive damages. Olick then filed an answer to the amended complaint and a counterclaim for breach of contract, "interference in business," fraud and punitive damages. On June 1, 2000, a hearing was held before a Board of Arbitrators in the Court of

[2] Olick maintains that Robinson refused to honor his agreement to transfer the liquor license, and that as a result, on October 11, 1996, he brought suit against Robinson to recover this property. According to Olick, this suit was settled when Robinson agreed to transfer the liquor license to Olick and to be amenable to an indemnity suit if appellees chose to take action against Olick for any delay in conveying the liquor license to them. Doc. 5 at 17.

Common Pleas of Northampton County and an award against Olick in the amount of $8,500 was entered. On June 7, 2000, Olick, not having previously requested a stay during more than three years of litigation, filed a motion to vacate this award on the ground that it violated the bankruptcy automatic stay provisions of 11 U.S.C. §§ 362(a)(3) and 364(a)(4). Olick also filed an adversary complaint against appellees in the United States Bankruptcy Court for the Eastern District of Pennsylvania on November 16, 2000, seeking damages for their post-petition breach of the lease, their post-petition tortious interference with business, and punitive damages for their intentional, wanton and outrageous post-petition conduct. Pursuant to 28 U.S.C. § 1334(c), on January 19, 2001, appellees filed a motion requesting that the bankruptcy court abstain from taking action on Olick's adversary complaint. On June 25, 2001, the bankruptcy court granted appellees' motion for abstention and on November 9, 2001, the bankruptcy court denied Olick's motion for reconsideration. Olick now appeals this order of the bankruptcy court which denied his motion to reconsider its determination that both mandatory and permissive abstention of Olick's adversary action were appropriate.

STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994). The standard of review for a denial of a motion for reconsideration depends on the nature of the underlying judgment. *McAlister v. Sentry Ins. Co.*, 958 F.2d 550, 552-53 (3d Cir. 1992). When asked to determine whether the bankruptcy court erred in denying a motion for reconsideration by failing to correct an error of law, the

district court must exercise plenary review. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

DISCUSSION

In the instant appeal, the court must determine whether the bankruptcy court erred in denying Olick's motion for reconsideration of its June 25, 2001 decision to abstain from acting on his adversary complaint. A motion for reconsideration may be granted if there is "(1) an intervening change in the controlling law; (2) the availability of new evidence [not available previously]; [or] (3) the need to correct clear error [of law] or prevent manifest injustice." *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995) (citations omitted). Olick does not argue that there has been an intervening change in the controlling law, or that he has discovered evidence previously unavailable to him. His sole argument is that the bankruptcy court erred in denying his motion for reconsideration because it failed to correct a clear error of law.[3]

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[3] Olick raises this clear error of law by way of four issues designated for the court's review on appeal:

> (1) Is a post petition lawsuit seeking to take possession over assets of the bankruptcy estate a violation of the bankruptcy stay?
> (2) Does the Pennsylvania Court of Common Pleas of Northampton County have jurisdiction to determine whether the appellees are liable for damages for an intentional violation of the bankruptcy stay?
> (3) Did the bankruptcy court judge abuse his discretion by finding that appellees' post petition lawsuit did not violate the bankruptcy stay?
> (4) Did the bankruptcy court abuse its discretion when it refused to allow Olick to amend his adversary complaint to more clearly assert a violation of the automatic stay against appellees? (Record, Doc. 4)

It appears that each of the above issues was presented in some form to the bankruptcy court below.

Olick contends that the bankruptcy court erred in finding that the prerequisites for mandatory abstention[4] and the relevant factors for permissive abstention[5] existed for Olick's adversary complaint. Specifically, Olick takes issue with the bankruptcy court's finding that his complaint raised only matters of state law, thereby making state court an appropriate forum in which to litigate. Olick contends that he is entitled to damages under section 362(h) of the bankruptcy code because appellees intentionally and willfully violated the bankruptcy stay by pursuing their state law cause of action to recover his liquor license (even though he fully participated in this litigation without raising the issue until an adverse award) when they knew this property was part of the bankruptcy estate.[6] Accordingly, he argues that his complaint raises

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[4] The six requirements that must be met before a bankruptcy court may abstain pursuant to 28 U.S.C. § 1334(c)(2) are as follows: (1) a timely motion is made; (2) the proceeding is based upon a state law claim or a state law cause of action; (3) the proceeding is related to a case under Title 11; (4) the proceeding does not arise under Title 11; (5) the action could not have been commenced in a Federal Court absent jurisdiction under 28 U.S.C. § 1334; (6) the action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction. *Steinman v. Spencer*, 206 B.R. 737, 747 (Bankr. E.D. Pa. 1996).

[5] In determining whether permissive abstention is appropriate, courts have turned to a host of factors, including: (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed appellees. *Steinman,* 206 B.R. at 751.

[6] Generally, the protections of the bankruptcy stay may not be waived. *Maritime Elec. Co., Inc., v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1992). However, if a debtor appears and defends a suit on any basis other than application of the automatic stay, there is authority that the debtor has then waived the protections of the stay with respect to the outcome of the litigation. 9B Am. Jur. 2d *Bankruptcy* § 1571 (2002). "To hold otherwise would allow the debtor to have a trump card that it could play if it did not like the outcome of the action, while allowing the debtor to take advantage of a favorable judgment." Id. Here, Olick's delay in raising the issue of whether appellees' action of filing a state court suit violated the automatic stay appears to be an attempt to use such a trump card. After all, it was not until an arbitration award was entered against Olick that he raised this issue, seemingly as an attempt to have the

bankruptcy law issues that must be resolved in bankruptcy court, thereby preventing the bankruptcy court from abstaining. As will seen below, appellees did not violate the bankruptcy stay, and therefore this issue is without merit, because,

Appellees' act of bringing suit to enforce the lease agreement and to gain possession of the liquor license did not violate sections 362(a)(3) and (a)(4) of the bankruptcy code. Pursuant to 11 U.S.C. §§ 362(a)(3) an automatic stay operates for "any act to obtain possession of property of the [bankruptcy] estate or to exercise control over property of the [bankruptcy] estate." Similarly, section 362(a)(4) of the bankruptcy code provides for an automatic stay of "any act to create, perfect, or enforce any lien against property of the estate." Appellees have not taken steps beyond filing suit against Olick to otherwise obtain possession of, or to acquire a lien on, Olick's bankruptcy estate property. The action by appellees sought money damages. Although appellees' suit proceeded to an arbitration award, there is simply no evidence before the court that appellees have attempted to execute or otherwise collect on this award, an action that admittedly would require appellees to seek relief from the automatic stay provisions as set forth in sections 362(a)(3) & 362(a)(4) of the bankruptcy code. Appellees mere act of filing a lawsuit does not amount to a violation of these provisions.[7]

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unfavorable judgment vacated.

[7] Under Pennsylvania law, an arbitration award when entered in the judgment index becomes a lien upon the party's real estate. Pa. R. Civ. P. 1307(b). Here, although an arbitration award was entered against Olick, the record before the court does not clearly establish that this award has been reduced to a judgment such that it has become an automatic lien on Olick's real estate. It is unclear from the record whether the commercial property that is the subject of the contested lease agreement between appellees and Thomas Olick is real estate owned in his name alone, or whether the real estate on which the Silver Dollar Café is located is owned jointly by him and his wife, Kathryn or by some other entity. It is also uncertain whether the arbitration award has been reduced to a judgment, as the Northampton County docket reflects that a motion

The applicability of the bankruptcy stay to suits brought against debtors is explicitly governed by section 362(a)(1) of the bankruptcy code. This section provides for an automatic stay of "the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. 11 U.S.C. § 362(a)(1). In other words, only actions commenced prior to bankruptcy are subject to the automatic stay; actions commenced after bankruptcy are not. *Avellino & Bienes v. M. Frenville Co., Inc.*, 744 F.2d 332, 335 (3d Cir. 1985). Appellees' state court action, which was filed nearly six months after Olick filed for bankruptcy, is a post-petition lawsuit, and therefore not subject to the bankruptcy automatic stay.

Olick argues that even though appellees' lawsuit was filed post-petition, the automatic stay is applicable because appellees brought suit in part as third-party beneficiaries to enforce the provision of the pre-petition Olick-Robinson lease agreement that granted Olick rights in the liquor license that he had promised to convey to appellees. Contrary to Olick's contention, the fact that appellees' lawsuit implicated this pre-petition lease agreement does not automatically transform it into a suit to which an automatic stay is applicable pursuant to 11 U.S.C. § 362(a)(1). Appellees' rights as third party beneficiaries to the Olick-Robinson agreement did not vest until September 1, 1996, when Olick and appellees entered an agreement whereby Olick was to convey the liquor license to appellees. As this was nearly two months after Olick filed for bankruptcy, appellees simply could not have commenced a third-party action to enforce the

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to vacate such award was filed by Olick and apparently has yet to be resolved. In light of the above, I cannot conclude that the award has become a final judgment against Olick or that a lien has attached to Olick's real estate such that the bankruptcy stay might have been violated.

Olick-Robinson lease agreement prior to the date of Olick's bankruptcy. The automatic stay of section 362(a)(1) is inapplicable here. In addition, because appellees pursuit of their state court action against Olick did not violate any stay provision of the bankruptcy code, his claim to damages under 11 U.S.C. § 326(h) is meritless.[8]

Thus, the bankruptcy court's determination that appellees' post petition lawsuit did not violate the automatic stay was not erroneous and the bankruptcy judge did not abuse his discretion in reaching this conclusion. Accordingly, the first and third issues designated by Olick on appeal do not establish a basis for the court to vacate the bankruptcy court's order of November 9, 2001. Moreover, because appellees did not violate the automatic stay by filing a post petition lawsuit, the second issue raised by Olick, whether the Pennsylvania state court has jurisdiction to determine liability for violations of the bankruptcy stay, is irrelevant and need not be resolved. Finally, in light of the finding that there was no violation of the automatic stay here, the fourth issue raised by Olick, whether the bankruptcy court abused its discretion when it refused to allow Olick to amend his adversary complaint to more clearly state a claim establishing his entitlement to damages pursuant to section 362(h) of the bankruptcy code, will not be resolved in his favor. The bankruptcy judge was correct not to grant Olick leave to amend his complaint when such an amendment would be futile. *Cowell v. Palmer Township*, 263 F.3d 286, 296 (3d Cir. 2001).

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[8] Olick claims that on November 26, 2001, he re-filed for chapter 13 bankruptcy, and that as a result, appellees' state law action is a pre-petition suit and is stayed by 11 U.S.C. § 362(a)(1). Doc. 5 at 1. Evidence of Olick's re-filing, however, is not anywhere in the record before the court.

CONCLUSION

Olick's adversary complaint against appellees alleges breach of contract, tortious interference with business and conversion and it seeks compensatory and punitive damages. The resolution of these issues is governed entirely by state law. Appellees did not violate the bankruptcy stay, and therefore, contrary to Olick's contention, he is not entitled to damages under the bankruptcy code. Bankruptcy law is simply not implicated by Olick's adversary complaint. Accordingly, the bankruptcy court correctly found that Olick's complaint was based solely on state law and that in deciding to abstain it had not made a clear error of law that required it to grant Olick's motion for reconsideration. Accordingly, I will affirm the bankruptcy court's November 9, 2001 order denying reconsideration of its June 25, 2001 order granting abstention.

An appropriate order follows.

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v.	:	
	:	
GARY EVERITT and	:	
DANYELLE MOZZATTO	:	
Appellees/Appellees.	:	

ORDER

And now, this _____ day of June, 2002, upon consideration of debtor Thomas W. Olick's Appeal Brief; and Gary Everitt and Danyelle Mozzatto's opposition; it is hereby ORDERED that the bankruptcy court's Order dated November 9, 2001, denying reconsideration of its June 25, 2001 order is AFFIRMED.

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William H. Yohn, Jr., Judge